ASSOCIATION OF BAY AREA GOVERNMENTS
Representing City and County Governments of the San Francisco Bay Area

Mailing Address: P.O. Box 2050, Oakland, California 94604-2050
Street Address: Joseph P. Bort MetroCenter, 101 Eighth Street, Oakland, California 94607-4756
Tel: (510) 464-7900 Fax: (510) 464-7970
info@babag.ca.gov

ABAG

TO: COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

FR: KENNETH K. MOY, LEGAL COUNSEL
ASSOCIATION OF BAY AREA GOVERNMENTS

RE: REGIONAL HOUSING NEEDS DETERMINATION: COUNCILS OF GOVERNMENT (04-RL-3929-05)

DT: MARCH 24, 2005

EXECUTIVE SUMMARY

The Association of Bay Area Governments (ABAG) submits this response to "Item 2: Appeal of Executive Director's Decision that Section 1188.4 of the Commission's Regulation Does Not Apply to the Reconsideration of the Decision in Regional Housing Needs Determination: Councils of Governments (04-RL-3929-05)" (hereafter, "Staff Analysis"). ABAG contends that Title 2, Cal. C. of Regulations Sec. 1188.4 (hereafter, "Section 1188.4") does apply to 04-RL-3929-05 (hereafter, "RHNA Reconsideration"). In the alternative, even if Section 1188.4 does not apply in its entirety, due process requires Section 1188.4(f)(2) apply to the RHNA Reconsideration. The Executive Board of ABAG voted unanimously at its March 17, 2005 meeting to support this position and to oppose overturning the prior decision.

ANALYSIS

The Commission on State Mandates (Commission) was created in 1984 as a quasi-judicial body.[1] The Commission was explicitly granted the power to reconsider a decision within "30 days after the statement of decision is delivered or mailed." Govt. C. Sec. 17559

In 1989, the Commission posed the following question to the Attorney General of the State of California: Does the Commission on State mandates have the authority to reconsider a prior final decision relating to the existence or non-existence of State mandated costs? The Attorney General's reply was: The Commission on State Mandates does have the authority to reconsider a prior final decision relating to the existence or non-existence of State mandated costs, *where the prior decision was contrary to law* (emphasis added). The Attorney General reasoned that:

> "Determinations by the commission as to entitlement of local agencies to reimbursement for state mandated costs are questions of law. (citation omitted) An administrative agency is not authorized to act contrary to law. (citation omitted) Consequently, where the decision in a prior case was based upon an erroneous legal premise, and is contrary to law . . . the administrative agency, having exceeded its authority, may reconsider its decision notwithstanding the absence of express statutory sanction." 72 Op. Atty. Gen. Cal. 173

The Commission, as a quasi-judicial body, must provide for, and observe, due process requirements for its decision making.[2]

---

[1] The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIII B of the California Constitution . . . . it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes . . . . Further, the Legislature intends that the Commission on State Mandates, as a quasi-judicial body, will act in a deliberative manner . . . . Govt. C. Sec. 17500.

[2] See *Johnson v. City of Loma Linda et al.,* 24 Cal. 4th 61; 5 P.3d 874; 99 Cal. Rptr. 2d 316; 2000 Cal. LEXIS 6119 (2000).

In 1998, the Commission promulgated Section 1188.4 to provide a fair process for its consideration of a prior final decision. Section 1188.4(a)[3] describes a reconsideration authorized by Govt. C. Sec. 17559. Section 1188.4(b)[4] describes a reconsideration "to correct an error of law." This language bears a striking resemblance to language used by the Attorney General to describe the Commission's implied power to reconsider a prior decision (hereafter, "implied reconsideration"). One can reasonably conclude that the Commission concurred in the Attorney General's analysis and that Section 1188.4 covers implied reconsideration actions.

In keeping with the Commission's mandate to render sound decisions and to act in a deliberative manner, and to provide a fair process for those whose interests are adjudicated by it: (1) Section 1188.4(f)(1) requires a staff analysis and five (5) affirmative votes of the Commission to reconsider a prior decision, and (2) Section 1188.4(f)(2) requires five (5) affirmative votes of the Commission to overturn a prior decision.

SB 1102 directs the Commission "to determine whether the [statute mandating a regional housing needs allocation process on councils of governments, cities and counties] is a reimbursable mandate under Section VI, Article XIII B of the California constitution in light of federal and State statutes enacted and federal and State court decisions rendered since [the aforementioned statute] was enacted, including the existence of fee authority pursuant to Section 65584.1 of the Govt. C."[5] It is beyond dispute that the proposed RHNA Reconsideration before the Commission is based on SB 1102's perceived need to "correct an error of law." Thus, with the minor deviation described below, the proposed RHNA Reconsideration falls squarely within the ambit of an implied reconsideration.

Only the mere fact that the reconsideration is requested by the Legislature differentiates the reconsideration requested by SB 1102 from reconsiderations described in Section 1188.4(b) and governed by the procedural safeguards in the balance Section 1188.4. Under Section 1188.4(b), implied reconsiderations are described as those commenced upon a request by "any interested party[6], affected state agency, or commission member."[7] According to the staff analysis, omission of the Legislature from this list renders the procedural safeguards of Section 1188.4 moot. This analysis runs counter to due process requirements.

In promulgating Section 1188.4, the Commission set a high procedural threshold for overturning a prior decision - the Commission must vote twice and each time by five (5) affirmative votes – when reconsideration is requested by entities directly involved in the prior decision. It is untenable for the Commission to now eviscerate those safeguards when the request for reconsideration comes from an entity that is not directly involved in the prior decision.

---

[3] " . . . the commission may make substantive changes to a prior final decision under this section or order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant."

[4] "Except as provided elsewhere in this section, any interested party, affected state agency, or commission member may request that the commission reconsider or amend a test claim decision and change a prior final decision to correct an error of law."

[5] SB 1102, Section 109.

[6] "'Interested party' means a local agency or school district; an organization or association representing local agencies or school districts; or a person authorized to represent a local agency or school district, having an interest in a specific claim or request other than the claimant. Title 2 CCR Section 1181.1(k)

[7] Section 1188.4(b).

The staff analysis also relies on SB 1102's pronouncement that "[n]otwithstanding any other provision of law" the Commission shall reconsider specified prior decisions for the proposed evisceration of the Commission's rules. The staff analysis presupposes that any procedure that might impede a rush to overturn the prior decisions of the Commission must be swept aside to accommodate SB 1102.

ABAG disagrees. One ought not to presume that the Commission will ignore SB 1102's demand that the Commission's prior decisions *be reconsidered.* The Commission should be given the opportunity to grant the request under the Commission's own rules - by five (5) affirmative votes. This preserves the Legislature's prerogative[8] and the Commission's autonomy.

Finally, there is absolutely no basis for ignoring the five (5) affirmative vote requirement to actually overturn the Commission's prior decisions. SB 1102, with its overarching statement - "[n]otwithstanding any other provision of law" – *may* be able to compel the Commission to undertake reconsideration. However, even by its own terms, SB 1102 does not attempt to direct the Commission to actually overturn the prior decisions. Therefore, Section 1188.4(f)(2)'s five (5) affirmative vote requirement to overturn a prior decision is not a legal impediment to SB 1102's direction and due process requires that the same voting procedure be applied regardless of who asks for the reconsideration.

[8] The Commission is not the appropriate forum to raise the issue of whether the Legislature has the authority it assumes in Section 109 of SB 1102 under *Carmel Valley Fire Protection District v. State,* 25 Cal. 4th 287; 20 P.3d 533; 105 Cal. Rptr. 636; 2001 Cal. LEXIS 1814 (2001)